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CITATIONS

355-694—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 17

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES D. KNOX

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order and memorandum of the district court dismissing the indictment (A. 8) has not been reported.

JURISDICTION

The order of the district court was entered on July 24, 1968. The notice of appeal was filed on August 21, 1968. This Court noted probable jurisdiction on April 21, 1969 (394 U.S. 971). The jurisdiction of this Court rests on 18 U.S.C. 3731, which authorizes the government to appeal directly from a decision sustaining a motion in bar, when the defendant has not been put in jeopardy.

QUESTION PRESENTED

Whether this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, require the dismissal of an indictment charging one who registered under the wagering tax laws with knowingly and willfully making false statements in the registration forms he filed.

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

26 U.S.C. 4412 provides, in pertinent part:

> (a) Requirement.
>
> Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—
>
> (1) his name and place of residence;
>
> (2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; * * *

STATEMENT

On October 3, 1967, a twenty-four count indictment against appellee and others was returned in the United States District Court for the Western District of Texas. Appellee was named in the first six counts (A. 2-6). Counts one through four charged that during the period July 1, 1964, to October 13, 1965, appellee had engaged in the business of accepting wagers, but had failed to file Internal Revenue Service Form 11–C, the special wagering tax return and registration application required by 26 U.S.C. 4412, and had also failed to pay the occupational tax imposed by 26 U.S.C. 4411. Count five charged that on a Form 11–C which appellee did file on October 14, 1965, he knowingly and willfully made false statements, in violation of 18 U.S.C. 1001. Count six charged similar false statements made in a supplemental form filed on October 15, 1965. The alleged misrepresentations involved understating the number of employees and agents engaged in receiving wagers on appellee's behalf.

After this Court decided *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, appellee filed his "Defenses and Objections Raised to the Indictment," in which he alleged that the wagering tax laws and the regulations issued pursuant thereto were constitutionally invalid in that they compelled those required to register to give information incriminating under State law (A. 6–7). In its response, the government stated that it would pursue only the charges contained in counts five and six, and argued

that, as to these counts, appellee's objections were "largely irrelevant" (A. 7). The district court granted appellee's motion to dismiss in its entirety, however, stating that its decision dismissing the counts charging false statements was controlled by *Grosso,* where this Court reversed a conviction for conspiracy to violate the wagering tax laws as well as a conviction on substantive counts, on the ground that prosecution was barred by assertion of the privilege against self-incrimination (A. 8). The court below reasoned that since the privilege "would have prevented prosecution for failure to answer the form in any respect," appellee could not be prosecuted for his "alleged failure to answer the wagering form correctly" (*ibid.*).

SUMMARY OF ARGUMENT

Marchetti and *Grosso,* relied upon by the district court as authority for dismissal of the indictment, including the counts under 18 U.S.C. 1001, are not controlling here. The act of submitting false statements differs significantly from the failure to comply at all with the registration requirements of the wagering tax laws. It is not a direct challenge to the validity of a statute, but rather a calculated attempt to deceive and mislead the government through feigned or purported compliance. Accordingly, the charge of submitting false statements does not automatically fall because appellee could have invoked the privilege against self-incrimination as a complete defense to a charge of failure to register. *Grosso* v. *United States,* 390 U.S. 62, which struck down an indictment for conspiracy as well as failure to comply with the sub-

stantive provisions, does not hold otherwise, since the conspiracy there was one to evade payment of wagering taxes by failing to register. In the instant case, on the other hand, the essence of the false statement counts of the indictment is the making of fraudulent misrepresentations to the government. Thus, for reasons elaborated more fully in our brief in *Bryson* v. *United States,* No. 35, 1969 Term, the district court erred in dismissing the false statement counts of the indictment, which properly charged violations of 18 U.S.C. 1001.

ARGUMENT

THE FACT THAT APPELLEE WOULD HAVE HAD A VALID DEFENSE TO A CHARGE OF FAILURE TO REGISTER DOES NOT JUSTIFY HIS WILLFULLY FALSE STATEMENTS WHEN HE DID REGISTER IN PURPORTED COMPLIANCE WITH THE WAGERING TAX LAWS

The counts of the indictment against appellee that are involved in this appeal charge him with deliberately endeavoring to deceive the government by filing registration statements under the wagering tax laws that misrepresented the number of persons who received wagers on his behalf. Question 5(b) of the forms that appellee filled out and filed (App. 13) asks the registrant to state, as 26 U.S.C. 4412(a)(2) requires, the "[N]umber of employees and/or agents engaged in receiving wagers on your behalf," and question 5(c) asks for the names, addresses and special tax stamp numbers of all such persons. Count five of the indictment charges that appellee falsely answered both of these questions "none" in a form filed on October 14, 1965 (App. 4, 11), and Count six charges that a

form that appellee filed the next day falsely stated that he had three such employees or agents (listing three names and addresses) when in fact there were more (App. 5, 12). In signing the registration forms, appellee subscribed to a declaration that "this return and/or application * * * has been examined by me and to the best of my knowledge and belief is true, correct, and complete," and the obverse of the form called attention to the penalties under 18 U.S.C. 1001 for knowingly making false statements.

We submit that the indictment properly charged violations of 18 U.S.C. 1001, and that the district court, in dismissing these counts, misinterpreted and misapplied this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62. Those cases hold only that a person who properly asserts the privilege against self-incrimination may not be prosecuted for failing to register and report information as required under the wagering tax laws. But appellee did register and report, fraudulently purporting to give correct information about his employees or agents. He is charged not under the wagering tax laws but under the False Statement Act. The policy that underlies that statute—protection of the integrity of information given to the government for official purposes—is unrelated to the interests sought to be protected by the rule in *Marchetti* and *Grosso*. That policy requires that plaintiff be punished for his false statements if a trial proves that they were in fact knowingly and willfully false.

Our brief in *Bryson* v. *United States*, No. 35, 1969 Term, which is set for consideration by the Court im-

mediately preceding the instant case, reviews in detail (pp. 12–27) the considerations and the authorities that establish the sound proposition that even a constitutionally forbidden question must be answered truthfully if it is answered at all. There, as here, it is assumed for purposes of argument that the defendant would have had a constitutional justification for refusing to make any statement at all.[1] There, as here, the prosecution was directed at enforcement of the False Statement Act and in no way at enforcement of the statutory requirement that triggered the false statement. For the reasons given in our *Bryson* brief, we submit that the rule established in *Dennis* v. *United States*, 384 U.S. 855, is correct and that it applies to a prosecution under 18 U.S.C. 1001 for making a false statement as much as it does to the "conspiracy, cynical and fraudulent" to evade the underlying statute that was involved in *Dennis*. Here, as in *Bryson* and in *Dennis* (384 U.S. at 865–866):

> * * * Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent the law and not to challenge it—a purported compliance

[1] We argue alternatively in *Bryson* that the underlying statute, former Section 9(h) of the Taft-Hartley Act, 61 Stat. 136, 146, was in fact constitutional, as this Court held in *American Communication Assn.* v. *Douds*, 339 U.S. 382. But our first argument, which is pertinent to this case, is that the Court need not reach the constitutionality of that statute because the defendant is not in a position to attack it.

> with the statute designed to avoid the courts, not to invoke their jurisdiction.
>
> It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective. Ample opportunities exist in this country to seek and obtain judicial protection. There is no reason for this Court to consider the constitutionality of a statute at the behest of [persons] indicted for conspiracy [or other illegal efforts] by means of falsehood and deceit to circumvent the law which they now seek to challenge. This is the teaching of the cases.[2]

It was significant in *Dennis*, as it is in *Bryson*, that the statute whose evasion was charged, Section 9(h) of the Taft-Hartley Act, had been held constitutional by this Court prior to the time of the filing of the false statements (384 U.S. at 867). So also in the instant case, when appellee filed his fraudulent registration forms in 1965, the wagering tax registration requirement carried this Court's constitutional imprimatur. *United States* v. *Kahriger*, 345 U.S. 22; *Lewis* v. *United States*, 348 U.S. 419. Although the *Marchetti* and *Grosso* decisions subsequently demonstrated that the wagering tax laws were "not immune to judicial challenge" (as this Court's decision in *United States* v. *Brown*, 381 U.S. 437, may also have suggested with respect to Section 9(h) of the Taft-Hartley Act),[3] ap-

[2] Two of the cases referred to and relied on by the Court in *Dennis*—*United States* v. *Kapp*, 302 U.S. 214, and *Kay* v. *United States*, 303 U.S. 1—are directly pertinent here and are discussed at some length in our brief in *Bryson* (pp. 15–17).

[3] In 1959 Congress repealed Section 9(h), which required officers of labor unions to execute non-Communist affidavits in

pellee, like the defendants in *Dennis* and *Bryson*, is disqualified from making the challenge in this case because of his lawless behavior. Instead of proceeding honestly upon the basis of any belief he might have had that the registration and reporting requirements were constitutionally unenforceable, by deciding not to register at all he tried to have it both ways by feigning compliance with the statute against the chance that it might continue to be constitutionally valid. As the Court held in *Dennis*, a statute, in such circumstances, "may not be circumvented by a course of fraud and falsehood, with the constitutional attack being held for use" only if the fraud is discovered (384 U.S. at 867).

The instant case differs from *Bryson* in that the claim of unconstitutionality in the statute that triggered the unlawful statement, 26 U.S.C. 4412, is founded not upon the First Amendment but upon the Fifth Amendment. We show in *Bryson* that, in the light of the factual record upon which the defendant was convicted, he can make no claim of unconstitutional vagueness in the request for information. No such contention could conceivably be made here as a defense to appellee's allegedly false statements. The questions that appellee is alleged to have answered

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order for their unions to utilize the services of the National Labor Relations Board, and substituted Section 504 of the Labor-Management Reporting and Disclosure Act (29 U.S.C. 504), which made it a crime for any person who had been a member of the Communist Party within the previous five years to be a union officer. *Brown* held Section 504 unconstitutional as a bill of attainder (see *Dennis*, 384 U.S. at 857, n. 2, 864–865).

falsely were clear and do not remotely intrude upon protected speech, ideas or rights of association.

Moreover, it is pertinent that neither *Marchetti* nor *Grosso* held that it would be unconstitutional for the government to require those who accept wagers to register and report or to pay taxes. As the Court said in *Marchetti* (390 U.S. at 61):

> We emphasize that we do not hold that these wagering tax provisions [requiring registration and payment of the occupational tax] are as such constitutionally impermissible; we hold *only* that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for *failure* to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is *otherwise outside the privilege's protection,* nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes. [Emphasis added.]

And in *Grosso,* the Court again explicitly stated (390 U.S. at 69–70, n. 7):

> * * * We do not hold today either that the excise tax is as such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation; we hold only that such a claim of privilege precludes a *criminal conviction* premised on failure to pay the tax. [Emphasis added.]

There can be no argument, then, that the questions that appellee is alleged to have answer falsely are inherently unconstitutional in themselves. Rather, *Marchetti* and *Grosso* hold only that, in view of the

statutory scheme of which those questions are a part, appellee might not have been prosecuted had he failed to file the registration form at all and properly asserted his privilege against self-incrimination. That privilege can, of course, be waived by a failure to assert it in a timely and proper manner. See, *e.g.*, *Rogers* v. *United States*, 340 U.S. 367, 372–375; *Brown* v. *Walker*, 161 U.S. 591, 597. Thus, the fact that under certain circumstances the Fifth Amendment would forbid punishment for refusing to register at all does not mean that the statutory registration requirement was beyond the government's jurisdiction. Certainly it offers no support for the proposition, upon which the district court's judgment must depend, that appellee had a license to provide deceitful information.[4]

[4] In his motion to dismiss or affirm appellee contended that the indictment does not charge any offense under 18 U.S.C. 1001 since it alleges only that he failed to answer certain questions on the forms he filed, and not that he answered any questions falsely. But counts five and six of the indictment (A. 4–6) charge not simply a mere failure to answer questions, but rather "that the number of employees and/or agents * * * [was] misrepresented and understated, in that the number, name [etc.] * * * had been omitted" from the two forms which appellee had declared to be "true, correct, and complete" to the best of his knowledge.

In any event, whether there was, in fact, only a failure to answer and whether appellee sought to assert his privilege against self-incrimination are questions which cannot be answered on the record now before the Court. The only issue presented by the dismissal of the indictment against appellee is the availability of his privilege against self-incrimination as a defense to the charge that he falsified his registration forms. Appellee has asserted matters which, if he is able to establish the necessary factual support for them, may constitute defenses to the charges against him, but this appeal is not the appropriate context for their resolution. See *United States* v. *Freuhauf*, 365 U.S. 146.

Even if the government could not constitutionally pose the questions, it would not follow that the Fifth Amendment authorizes evasive or fraudulent answers to them. Appellee chose to submit the registration form and purported to answer all of the questions on that form. He was therefore in a situation analogous to that of a defendant at a criminal trial, who may decline to testify, but who must testify truthfully if he chooses not to rely upon his privilege of silence. See *Harrison* v. *United States,* 392 U.S. 219, 222. Similarly, it is irrelevant to a perjury charge if the statutory basis for the proceedings is subsequently found unconstitutional. As this Court has said in *United States* v. *Williams,* 341 U.S. 58, 68–69:

> Though the trial court or an appellate court may conclude that the statute [under which the proceedings were brought] is wholly unconstitutional, or that the facts stated in the indictment do not constitute a crime or are not proven, it has proceeded with jurisdiction and false testimony before it under oath is perjury.

The analogy that the district court drew between the charges against appellee here and the conspiracy conviction that this Court set aside in *Grosso,* together with the substantive convictions, does not withstand analysis. In *Grosso* the defendant had been convicted on fifteen counts of failure to pay the wagering excise tax in violation of 26 U.S.C. 4401, four counts of failing to pay the special occupational tax imposed by 26 U.S.C. 4411, and one count of conspiracy to commit the foregoing substantive offenses, and thereby defrauding the government of payment in violation of

18 U.S.C. 371 (390 U.S. at 63). This Court agreed with his defense that payment of the excise tax would indeed have created "real and appreciable" hazards of self-incrimination (390 U.S. at 67–69), and therefore reversed as to the excise tax counts. Finding no effective waiver of the privilege in regard to the occupational tax counts, the Court held that convictions for these violations also could not stand (*id.* at 71). The conspiracy charge, bottomed solely on allegations of evasion of the excise and occupational taxes, raised "questions identical with those presented by the substantive counts," the Court determined, and thus reversal of the substantive charges compelled dismissal of the conspiracy count (*id.* at 70).

Here, in contrast to the conspiracy count in *Grosso,* the false statement counts are not identical, or even similar, to charges of failure to file a return or pay a tax. To the extent that filing a registration form involved self-incrimination, petitioner incriminated himself by his act of filing. The false statement counts are substantive in themselves, and are not founded upon any evidence protected by the privilege against self-incrimination. They merely charge that, having decided to file a Form 11–C, appellee did so falsely, and thus violated 18 U.S.C. 1001—a provision having no connection, directly or indirectly, with the wagering tax laws. Rather, those laws simply provided the framework within which appellee allegedly committed violations of a wholly distinct criminal statute. See *Dennis* v. *United States,* 384 U.S. at 867.

In summary, we submit that this case, like its companion, *Bryson*, is governed by the firmly established principle that a defendant charged with fraud or deceit against the government has no standing to seek to justify himself by a constitutional attack on the law that provided the setting for his lawless conduct. Putting the matter in another way, no element of the charges against appellee and Bryson under the False Statement Act turns on the validity *vel non* of the governmental requirements that triggered their allegedly false statements. *A fortiori,* fraud in the course of purported compliance with a statute cannot be justified where, as in the instant case, the underlying statute is indeed valid, subject only to a properly invoked defense of the privilege against self-incrimination in a case of non-compliance. That defense to a criminal prosecution for violation of the wagering tax laws is, of course, all that *Marchetti* and *Grosso* established.[5] The counts of the indictment charging appellee with making false statements should not, therefore, have been dismissed simply because appellee could not have been prosecuted for making no statements whatsoever.

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[5] Cf. *United States* v. *United States Coin and Currency*, 393 F. 2d 499 (C.A. 7), certiorari granted, 393 U.S. 949, restored to the calendar for reargument, No. 8, 1969 Term.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed and counts five and six of the indictment ordered reinstated.

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